No. 681

IN THE

Supreme Court of the United States

October Term, 1948.

DINAH SHAW, a stockholder of CELANESE CORPORATION OF AMERICA, suing on behalf of herself and all other stockholders similarly situated and on behalf of and in the right of CELANESE CORPORATION OF AMERICA,

Petitioner,

against

CAMILLE DREYFUS and CELANESE CORPORATION OF AMERICA,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit, Brief and Argument in Support of the Petition.

MORRIS J. LEVY,
Attorney for Petitioner,
261 Broadway,
New York City.

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TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Dinah Shaw, a stockholder of respondent, Celanese Corporation of America, suing on behalf of herself and all other stockholders similarly situated, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, rendered January 19, 1949, which affirmed (Mr. Justice Charles E. Clark dissenting) the judgment of the District Court of the United States for the Southern District of New York against petitioner and in favor of respondents by denying petitioner's motion for summary judgment and granting respondents' cross-motion for summary judgment dismissing the complaint.

Opinions Below.

The opinion of the District Court is reported in 79 F. Supp. 533, and is also printed in the record (R. 55-59).

The majority opinion of the United States Court of Appeals affirming the judgment of the District Court, and the dissenting opinion written by Mr. Justice Clark in favor of reversing the judgment of the District Court, are reported in 172 F. (2d) 140 and are printed in the record (R. 68-73).

Jurisdiction.

The judgment of the United States Court of Appeals was entered January 19, 1949 (R. 73, 74). The jurisdiction of the District Court is founded on the provisions of Section 27 of the Securities Exchange Act of 1934, 48 Stat. 902, Title 15 U. S. C., Section 78aa.[1] The jurisdiction of this Court rests upon Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (Title 28 U. S. C., Section 347a).

Summary Statement of the Case.

Petitioner, a stockholder of respondent, Celanese Corporation of America, instituted an action on behalf of herself and other stockholders similarly situated, pursuant to Section 16(b) of the Securities Exchange Act of 1934, 15 U. S. C. A., Section 78p(b),[2] to compel the respondent, Dreyfus, an officer and director of the corporation, to account for and pay over to the corporation the profits which he realized from his "purchases and sales and sales and purchases" of the corporation's listed equity securities within periods of less than six months (R. 3-11).

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[1] The text of the statute appears in Appendix at page 21.

[2] The text of the statute appears in Appendix at pages 21, 22.

The respondent, Dreyfus, was an Officer, Director and Chairman of the Board of the respondent, Celanese Corporation of America (R. 4, 38, 56). The equity securities of the respondent corporation were and still are listed on a National Securities Excharge (R. 4).

Pursuant to resolutions adopted by its Board of Directors, the respondent corporation offered and granted to its common stockholders of record Rights to subscribe at $50 a share to additional shares of common stock on the basis of one share for each ten (10) shares held. The Rights were mailed out on October 9, 1945, and could be exercised on or before October 24, 1945 (R. 38, 39).

Respondent, Dreyfus, was the holder of record of 106,343 shares of the corporation's common stock, and accordingly, he was offered, granted and received 106,343 Rights from the corporation entitling him to subscribe for 10,634 3/10 shares of its common stock (R. 39).

During the month of October, 1945, the respondent, Dreyfus, sold 76,340 of the aforementioned Rights for which he received the net sum of $5,915.41 (R. 42).

On October 22, 1945, the respondent, Dreyfus, exercised 30,000 of his remaining Rights and subscribed for and was issued 3,000 shares of the corporation's common stock. Of these 3,000 shares, Dreyfus disposed of 1,460 shares thereof by means of gifts between November 12, 1945, and January 6, 1946. The market price of the stock on the dates the gifts were made was $57 3/8-$65 5/8 per share. The donees were three friends who were officers and/or directors of respondent corporation, ten members of their families, a personal employee, two employees of the respondent corporation and five of his relatives (R. 24, 46, 47).

In the courts below, petitioner contended that the acquisition by Dreyfus of the Rights to subscribe to the respondent corporation's common stock constituted a "purchase" within the definition of the word as set forth in Section 3(a)(13) of the Securities Exchange Act of 1934, Title 15 U. S. C., Section 78c(a)(13),[3] and within the meaning, intent and purpose of Congress in enacting the Act; that since there was a "purchase" followed by a "sale" within the six-month period, the net profit resulting therefrom is recoverable by the Corporation. Petitioner further contended that the gifts of common stock made by respondent, Dreyfus, constituted a "sale" within the definition of the word as set forth in Section 3(a)(14) of the Securities Exchange Act of 1934, Title 15 U. S. C., Section 78c(a)(14),[4] and within the meaning, intent and purpose of Congress in enacting the Act; that since there was a "purchase" of the common stock by Dreyfus, followed by a "sale" within the six-month period, the resulting profit is recoverable by the Corporation.

The Courts below have held in dismissing the complaint (1) that the acquisition of the Rights by Dreyfus did not constitute a "purchase" within the meaning and intent of Section 16(b) and 3(a)(13) of the Securities Exchange Act of 1934; (2) that the disposition of common stock by Dreyfus by means of gifts did not constitute a "sale" within the meaning and intent of Sections 16(b) and 3(a)(14) of the Securities Exchange Act of 1934.

Questions Presented.

A. Did the acquisition by respondent, Dreyfus, from the respondent Corporation of the 106,343 Rights to subscribe to the Corporation's common stock constitute a "Purchase" within the meaning and intent of Sections

[3] The text of the statute appears in Appendix at page 22.
[4] The text of the statute appears in Appendix at page 22.

16(b) and 3(a)(13) of the Securities Exchange Act of 1934?

B. Did the disposition by "Gifts" by respondent, Dreyfus, of the 1,460 shares of respondent Corporation's common stock constitute a "Sale" within the meaning and intent of Sections 16(b) and 3(a)(14) of the Securities Exchange Act of 1934?

Specifications of Errors to be Urged.

The United States Court of Appeals erred as follows:

1. In holding that the acquisition of the Rights by Dreyfus did not constitute a "purchase" within the meaning and intent of Congress in enacting Sections 16(b) and 3(a)(13) of the Securities Exchange Act of 1934.

2. In holding that the disposition by Dreyfus of common stock by means of gifts did not constitute a "sale" within the meaning and intent of Congress in enacting Sections 16(b) and 3(a)(14) of the Securities Exchange Act of 1934.

Reasons Relied on for Granting Petition.

This Certiorari is not sought for the purpose of reviewing facts but is based on the following grounds:

1. The decision of the United States Court of Appeals, the review of which is here prayed for, is in conflict with the decisions in *Park & Tilford, Inc., v. Schulte*, 2 Cir., 160 F. (2d) 984, Cert. denied, 68 S. Ct. 64, and *Smolowe v. Delendo Corporation*, 2 Cir., 136 F. (2d) 231, Cert. denied, 230 S. Ct. 751.

2. These conflicting decisions concerning the purpose and intent of Congress in enacting Section 16(b) of the Securities Exchange Act of 1934 involve important ques-

tions of national scope and are of the greatest importance and concern to the investing public of the United States. The obvious purposes of the Act will be defeated if the decision of the lower Court is adhered to. Only by giving Section 16 (b) the construction Congress intended will the purposes of the Act be accomplished and the public protected.

3. The decision of the United States Court of Appeals creates new law and new interpretations and is sufficiently important to warrant this Court to pass upon the legal questions involved.

4. In holding that the acquisition of the Rights by Dreyfus did not constitute a "purchase," and that the disposition of stock by Dreyfus by means of gifts did not constitute a "sale" within the meaning and intent of Section 16(b) of the Securities Exchange Act of 1934, the United States Court of Appeals has committed obvious error by construing "purchase" and "sale" contrary to the definitions given therefor in Sections 3(a)(13) and 3(a)(14), respectively, of the Securities Exchange Act of 1934.

5. As the obvious conflict and importance of the questions involved so clearly demonstrate the necessity for a review by this Court of the decision below, petitioner has not attempted in this petition to set forth at length the contentions on the merits of the controversy. The position of petitioner is stated at some length in the dissenting opinion of Mr. Justice Clark at record pages 72-73 and in the Brief submitted by petitioner herewith.

WHEREFORE, it is respectfully submitted that the Writ of Certiorari herein prayed for should issue.

March, 1949.

DINAH SHAW,
Petitioner.

By MORRIS J. LEVY,
Attorney for Petitioner.

BRIEF AND ARGUMENT IN SUPPORT OF THE PETITION.

POINT I.

The acquisition of the option rights by respondent, Dreyfus, from the corporation constituted a "purchase" within the meaning and intent of Section 16(b) of the Securities Exchange Act of 1934.

Section 3(a)(11) of the Securities Exchange Act of 1934, Title 15 U. S. C. A., Section 78c(a)(11), provides as follows:

> "The term 'equity security' means any stock or similar security; or any security convertible, with or without consideration, into such a security, or carrying any warrant or right to subscribe to or purchase such a security; *or any such warrant or right;* or any other security which the Commission shall deem to be of similar nature and consider necessary or appropriate by such rules and regulations as it may prescribe in the public interest or for the protection of investors, to treat as an equity security." (Italics supplied.)

Section 3(a)(13) of the Securities Exchange Act of 1934, Title 15 U. S. C. A., Section 78c(a)(13), defines the words "Buy" and "Purchase" as follows:

> "The terms 'buy' and 'purchase' each include *any contract to* buy, purchase, or *otherwise acquire.*" (Italics supplied.)

In *Kogan v. Schulte* (D. C., S. D. N. Y.), 61 F. Supp. 604, 608, Mr. Justice Leibell said:

> "Under Section 3(a)(13) of the Act, 15 U. S. C. A., Section 78c(a)(13). 'The terms "buy" and "purchase" each include any contract to buy, pur-

chase or otherwise acquire.' The above quoted definition supplements and adds to the ordinary interpretation of the word 'purchase' so as to include not only an actual purchase, but also any contract to buy, purchase or otherwise acquire."

The word "purchase" itself was not defined by the Act. But in enlarging its scope by Section 3a(13), Congress disclosed a clear *intent* to give it a broad, unrestricted meaning. Its full import is to be sought, therefore, from its associated words and the declared purpose of the act. *Smolowe v. Delendo Corporation*, 2d Cir., 136 F. (2d) 231, 238, Cert. denied, 230 U. S. 751; *Kogan v. Schulte, supra; Helvering v. Hammel*, 311 U. S. 504, 510; *Burnstein v. U. S. Lines Co.*, 2d Cir., 134 F. (2d) 89, 93.

The word "purchase" ordinarily represents an executed transaction. In declaring that the word includes "any contract to buy, purchase, or otherwise acquire," Section 3(a)(13) has added the executory transaction as well. But in describing the *kind* of *executory* transactions that are included by "purchase," the section is equally describing the kind of *executed* transactions that were intended to be embraced by the word. Had it been the Legislative intent to restrict the application of the Act, where a present transaction is involved, solely to a purchase for cash, Section 3(a)(13) would have added its corresponding executory contract. Therefore, unless it be assumed that the section arbitrarily included "any contract to * * * otherwise acquire" (that is to say a transaction which is entirely extraneous to the definition of "purchase"), it is reasonable to infer that the word was used in its widest sense of *any acquisition* rather than in its colloquial sense of a cash purchase.

Since the word "purchase" as used in the Act has been defined to include "any contract to * * * otherwise acquire," it would be pertinent to see how the word "ac-

quire" is defined in the English language. Funk & Wagnall's "New Standard Dictionary of the English language" defines the word as follows:

> "Acquire: * * * get as one's own; *receive or gain in whatever manner;* * * *." (Italics supplied.)

"Bouvier's Law Dictionary," Third Edition, defines the word as follows:

> "Acquire.—To make property one's own. To gain permanently. It is regularly applied to a permanent acquisition. A man is said to obtain or procure a mere temporary acquisition. *It has been held to include a taking by devise. Santa Clara Female Academy v. Sullivan,* 116 Ill. 376; 8 N. E. 183, 56 Am. Rep. 776." (Italics supplied.)

That the word "purchase," when used in a statute, must be given a broader meaning was indicated in *Johnson v. United States,* 9 Cir., 145 F. (2d) 137, where it was said (p. 138):

> "The provision for the 'purchase' of additional supplies does not necessarily mean a transfer for cash of stamp supplies by the government to clerks of contract stations and a resultant transfer of title * * *."

Hence, even as "purchase" includes any executory "contract to * * * otherwise acquire," so in its executed phase the word includes any present acquisition, whether for cash or otherwise. Admittedly, the respondent, Dreyfus, "otherwise acquired" the Rights from the Corporation, for only by first acquiring them could he afterwards have sold them.

Additional support for our view may be found in Section 16(b) itself. It will be observed that the section excludes from its operation any security which "was acquired in good faith in connection with a debt previously

contracted." It is clear, first of all, that "purchase" was used interchangeably with "acquisition." Secondly, by expressly excluding a security which is acquired otherwise than for cash, it is clear that "purchase" was meant to embrace such other acquisitions; conversely, if the word was intended to represent only cash transactions it would have been unnecessary to exclude, in express terms, a different type of transaction. Finally, in specifying the particular acquisition that is outside its scope, Section 16(b) by implication includes all other acquisitions.

In the Court below, the respondents argued that the mere acquisition by Dreyfus of the option rights from the corporation did not constitute a purchase. They argued that a purchase could only take place upon the conversion of the rights into common stock by payment of the subscription price therefor. We think that the statute permits the corporation to select either act (the contract to purchase or the payment of the subscription price) as the initial transaction. If the respondents' contention were upheld, evasion of the Act would become a simple matter. A director or officer of a corporation would then accomplish by indirection that which he is not permitted to do directly. Instead of converting rights to common stock by paying the subscription price therefor and *then* selling the common stock, within a six months' period, thus making the director or officer liable under the Act to the corporation for any profits he might realize thereon, he would merely have to sell his rights, take his profits and thereby fully escape the penalties, provisions and intent of the Act.

As Mr. Justice Clark stated in his dissenting opinion at record page 72:

> "• • • and 'contract' is broad enough to include an 'executed acquisition.' *Park & Tilford, Inc., v.*

> *Schulte*, 2 Cir., 160 F. 2d 984, 987, certiorari denied, *Schulte v. Park & Tilford, Inc.*, 332 U. S. 761. The statutory language is therefore inclusive enough to reach these transactions."

In *Smolowe v. Delendo Corporation, supra*, the Court said, at page 239:

> "The statute is broadly remedial. Cf. *Wright v. Securities and Exchange Commission*, 2nd Cir., 112 F. (2d) 89. Recovery runs not to the stockholder, but to the corporation. We must suppose that the statute was intended to be thorough-going, to squeeze all possible profits out of stock transactions, and thus to establish a standard so high as to prevent any conflict between the selfish interest of a fiduciary officer, director or stockholder and the faithful performance of his duty."

The Court also said (p. 238) that no meaning should be ascribed to the statute which is inconsistent with its declared purpose; that any interpretation that could make evasion possible and thus result in the emasculation of the Act must be avoided. With this in mind, the rule for determining the recoverable profits was fashioned so as to prevent evasion of the Act.

We dare say that the word "purchase" was deliberately left undefined in the statute for if any specific transaction had been described as coming within its purview, the way would have been left open for many ingenious forms of evasion. However, the word's commonly accepted meaning in legal usage (as any acquisition) is sufficiently clear to make the application of the statute to a particular transaction comparatively simple, especially when such transaction is examined in the light of the declared purpose of the Act.

As the statute was enacted to curb a widespread evil, it is a distinction without a difference that a short swing

profit is made by the acquisition of a right granted to a stockholder because of his stock ownership rather than for cash. Since Congress thought it necessary, in order to close any obvious avenue of evasion to treat "any contract to * * * otherwise acquire" as a purchase within the Act, the offering and granting by the corporation to its stockholders of rights or contracts permitting them to purchase common stock from the corporation at a stipulated price comes directly within the purview of the Act. It is plain that if in the process of statutory construction exceptions are allowed to creep into Section 16(b), in addition to the one it contains, the attrition of the Act will have begun. Only the broadest definition of "purchase" will prevent its emasculation. By giving it a meaning of any acquisition, a meaning, as has been seen, that is neither strained nor uncommon, will the word be interpreted in the light of the declared purpose of the Act.

In the Court below, the respondents argued that the rights issued to Dreyfus were but formal evidence of the rights he acquired when he bought his original stock and were inherent in his stock ownership; that the rights issued to him were analagous to a stock dividend, and since a stock dividend is distributed and not bought or purchased, the acquisition thereof by Dreyfus could not be considered a purchase.

The fallacy of respondents' reasoning is obvious. The offer and grant to stockholders of rights to subscribe to new stock of the corporation at a stipulated price is not of itself "a fruit of stock ownership in the nature of a profit" or dividend. The right to subscribe to new stock is an offer or contract by the corporation granting its stockholders, in preference to strangers, the privilege of contributing new capital to the corporation.

In *Miles v. Safe Deposit Co.*, 259 U. S. 247, the Court said:

> "It is not in dispute that the Hartford Fire Insurance Company is a corporation of the State of Connecticut, and that the stock increase in question was made under the authority of certain acts of the legislature and certain resolutions of the stockholders, by which the right to subscribe to the new issue were offered to existing stockholders upon the terms mentioned. It is evident, we think, that such a distribution, in and of itself, constituted no division of any part of the accumulated profits or surplus of the company, or even of its capital; it was in effect an opportunity given to stockholders to share in contributing additional capital, *not to participate in distribution.* It was a recognition by the company that the condition of its affairs warranted an increase of its capital stock to double the par value of that already outstanding, and that the new stock would have a value to the recipients in excess of $150 per share; a determination that it should be issued pro rata to the existing stockholders, or so many of them as would pay that price. *This privilege, of itself, was not a fruit of stock ownership in the nature of a profit; nor was it a division of any part of the assets of the company.*
>
> "The right to subscribe to the new stock was but a right to participate, in preference to strangers, and on equal terms with other existing stockholders, in the privilege of contributing new capital called for by the corporation."

In *Park & Tilford, Inc., v. Schulte*, 160 F. 2d 984, 988, cert. denied 68 S. Ct. 64, defendants owned preferred shares of the corporation. The board of directors passed a resolution authorizing the holders of the preferred stock to convert same into common stock. The defendants converted their preferred stock and thereafter sold the common stock within a six-month period, realizing a

profit thereon. The Court in holding that the conversion of the preferred stock by the defendants constituted a "purchase" within the meaning and intent of Section 16(b) of the Act, said:

> "Whatever might be the consideration involved in that situation, it is clear that here the defendants were not forced to convert, but instead made an every-day business decision as to the most profitable of three causes of action—redemption, conversion or outright sale of their preferred stock. Indeed, the contention that defendants were forced to convert is somewhat absurd, in view of the fact that since defendants controlled plaintiff they could have prevented the passage of the redemption resolution or rescinded it after it had been passed."

In the case at bar, respondent, Dreyfus, was an officer, director, chairman of the board and largest stockholder of the corporation. He owned approximately seven (7%) per cent of all the outstanding common stock and controlled the corporation's board of directors. Without his active support and acquiescence, the board of directors could not have passed the resolution authorizing the granting and issuance of the rights. Because of his position and control of the corporation he "could have prevented the passage" of the resolution "or rescinded it after it had been passed." He was not forced to sell the rights acquired by him, "but instead made an every-day business decision as to the most profitable of three causes of action"—personal exercise of the right by subscribing to and paying for new common stock, outright sale of the rights or permitting the rights to lapse. The corporation did not force Dreyfus to dispose of the rights. The election rested with him alone. In electing to sell a majority of the rights, he was admittedly actuated by the financial advantage accruing from the sale of the rights.

Dreyfus urged that it was more practical and profitable for him to sell the rights than subscribe to the common stock and pay the subscription price therefor. The respondent, however, overlooks the fact that as an officer and director of the corporation, he was subject to the provisions of Section 16(b) of the Act. Thus had Dreyfus subscribed to the common stock pursuant to the terms of the rights granted him and had he then sold the stock within a six-month period he concededly would be liable for the profits thereafter made.

As Mr. Justice Clark so aptly pointed out in his dissenting opinion in the United States Court of Appeals, at record page 73:

> "* * * So inside advance knowledge of an approaching issue of stock with grant of share-rights might point to the retention of stock already owned or the purchase of more, while the oridinary investor remains ignorant of the attractive possibilities about to open before him. In this instance, in fact, the gain is directly in money received on sale of the rights; if care must be taken to avoid direct subscription to the stock followed by sale—since that is within the statute under *Park & Tilford, Inc. v. Schulte, supra*—yet that means simply a quicker return on a smaller investment. In all these instances the principle seems to me the same; the insider has an obvious and attractive advantage over others, unless all are held to be within the statute."

POINT 2.

The disposition by "gift" by respondent, Dreyfus, of the 1460 shares of the common stock of Celanese constituted a "sale" within the meaning and intent of Section 16(b) of the Securities Exchange Act of 1934.

Section 3(a)(14) of the Securities Exchange Act of 1934, Title 15, U. S. C. A., Section 78c(a)(14), declares that:

> "The term 'sale' and 'sell' each include any contract to sell *or otherwise dispose of.*" (Italics supplied.)

The word "sale" itself was not defined by the Act. But in enlarging its scope by Section 3(a)(14) Congress disclosed a clear intent to give it a broad, unrestricted meaning. Its full import is to be sought, therefore, from its associated words and the declared purpose of the Act.

Since the word "sale" as used in the Act has been defined to include "otherwise dispose of," it would be pertinent to see how the word "dispose" and "dispose of" are defined in the English language.

"Bouvier's Law Dictionary," Third Edition, defines the word:

> "Dispose. To alienate or direct the ownership of property, or disposition by will."

Funk & Wagnall's "New Standard Dictionary of the English Language," defines

> "Dispose. 4. To make over; alienate or distribute; *as, to dispose one's fortune in charity; now generally expressed by dispose of.*" (Italics supplied.)

The definition of the word "sale" in the act to include the phrase "otherwise dispose of" was put there with a purpose. If Congress had intended that the "sale" be for cash it would not have been necessary to broaden the meaning of the word to include "otherwise dispose of." The purpose of broadening the ordinary definition of the word "sale" can have no other meaning but that it was the legislative intent to include any disposition of securities, and this would necessarily include a "gift."

In *Dickey v. Raisin Proration Zone No. 1*, Cal. App. 140 P. (2d) 53, 64, subsequent opinion Sup. 151 P. (2d) 505, a statute authorized a program committee to stabilize the market price of agricultural commodities by *disposing of* the surplus commodities. The Court held that the phrase "dispose of" in the statute authorized the committee to "give away" the surplus portion of the crop.

In *Troy Amusement Co. v. Attenweiler* (Crt. of Appeals, Ohio, 1940), 28 N. E. 2d 207, 64 Ohio App. 105, 121, a statute penalized anyone "who sells or disposes of" a ticket representing an interest in a scheme or chance. The Court, in holding that the phrase "disposes of" means also a "gift," said:

> "The statutes penalize anyone who sells or disposes of a ticket representing an interest in a scheme of chance. The phrase 'dispose of' used as it is, in connection with the word 'sells,' indicates that one may be guilty of an offense against the statute by gratuitously disposing of a ticket or device representing an interest in a scheme of chance."

In the Court below the respondents argued that a "gift" is not a "sale" as defined by Section 3(a)(14) of the Securities Exchange Act of 1934 because the donor received no consideration for the "gift." They further argued that even if the "gift" made by Dreyfus should

be construed a "sale" within the definition of the Act, Dreyfus, incurred no liability under the Act because he did not realize any profit on the transactions.

We respectfully submit that not only did the "gift" by Dreyfus constitute a "sale" under the provisions of the Act, but that Dreyfus did realize a profit on the transactions which inures to and is recoverable by the corporation.

The price at which Dreyfus purchased the stock was $50 per share. When he made the "gifts" the price at which the stock was selling for on the New York Stock Exchange ranged from between $57 3/8-$65 5/8 per share.

Title 26—Internal Revenue Code—Section 1005, Act of June 6, 1932, Ch. 209, Section 506, 47 Stat. 248, provides as follows:

> "If a gift is made in property, the value thereof at the date of the gift shall be considered the amount of the gift."

Thus the value of the gifts made by Dreyfus was the value of the stock at the time the gifts were made. If instead of making the gifts in stock, Dreyfus had first sold the stock within six months from the date of purchase and then given the *cash* realized from the sale to the donees, he concededly would have been liable to the corporation for the difference between the purchase and sales prices; this would be considered his "profit."

It is obvious that Dreyfus found it more expedient and profitable to make the gifts in stock than in first selling the stock and giving the gifts in cash, for only by doing the former could he hope to even attempt to escape the penalties provided for in Section 16(b) of the Act. If officers and directors were permitted to make gifts in stock to their relatives, friends and employees within six months from the date of their

purchases of the stock (the market value of the gifts on those dates being higher than the purchase price) without being liable to their corporations for the difference, evasion of the Act would become a simple matter. They could then do indirectly and with impunity that which they could not accomplish directly, without incurring the liability in the Act. They could then purchase stock of their corporation, and if the market went up within six months, they could make a "gift" thereof to their relatives and close friends. If these relatives and friends immediately sold the stock, the corporation could not recover the profits thereon. The way would be left open to unscrupulous directors and officers to make secret arrangements with these relatives and friends for the return of the profits realized from the sale of the stock within the six-month period. Proof of such secret arrangements would be very difficult and could hardly if ever be established. The very purpose and intent of the Act would be circumvented and defeated.

The purpose and intent of Congress in enacting the Act was "to be thoroughgoing, to squeeze all possible profits out of stock transactions, and thus to establish a standard so high as to prevent any conflict between the selfish interest of a fiduciary officer, director or stockholder and the faithful performance of his duty." *Smolowe v. Delendo Corporation, supra.*

That Court also said (p. 238) that any interpretation that could make evasion possible and thus result in the emasculation of the Act must be avoided.

Only the broadest definition of "sale" will prevent its emasculation. By giving it a meaning of any disposition, a meaning, as has been seen, that is neither strained nor uncommon, will the word be interpreted in the light of the declared purpose of the Act.

As Mr. Justice Clark so aptly pointed out in his dissenting opinion in the United States Court of Appeals, 172 F. (2d) 140, 143, at record pages 72-73:

> "When we turn to the purpose of the legislation, to wring the profit out of short-swing transactions by insiders, I should think this same result was indicated. If these transactions are without the scope of the Act, we have an area of considerable inducement to the insider to play for the short swing. When, indeed, the insider is a person of ample means and large public interests (as 'insiders' I fancy are prone to be), then the inducements here may be as substantial as, if not more so than, in the more prosaic cases heretofore decided. If one has at hand so ready a means of recompensing faithful personal service at home or in the office, or of making the ties of personal loyalty of company executive officers yet stronger than before, or, indeed--though this case is not before us—of remembering bountifully one's favorite charities, I should think the necessity of doing so only through the use of the stock itself, instead of the money which might be realized therefrom, was one which could be accepted with considerable tranquility."

CONCLUSION.

It is respectfully submitted that the writ of certiorari herein prayed for should issue.

March, 1949.

Respectfully submitted,

MORRIS J. LEVY,
Attorney for Petitioner.

APPENDIX.

Section 27 of the Securities Exchange Act of 1934 (Title 15, U. S. C., §78aa), reads as follows:

> "The district courts of the United States, the district court of the United States for the District of Columbia, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 225 and 347 of Title 28. No costs shall be assessed for or against the Commission in any proceeding under this chapter brought by or against it in the Supreme Court or such other courts."

Section 16(b) of the Securities Exchange Act of 1934, 15 U. S. C. A. Sect. 78p (b), provides as follows:

> "(b) For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer (other than an exempted security)

within any period of less than six months, unless such security was acquired in good faith in connection with a debt previously contracted, shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such beneficial owner, director, or officer in entering into such transaction of holding the security purchased or of not repurchasing the security sold for a period exceeding six months. Suit to recover such profit may be instituted at law or in equity in any court of competent jurisdiction by the issuer, or by the owner of any security of the issuer in the name and in behalf of the issuer if the issuer shall fail or refuse to bring such suit within sixty days after request or shall fail diligently to prosecute the same thereafter; but no such suit shall be brought more than two years after the date such profit was realized. This subsection shall not be construed to cover any transaction where such beneficial owner was not such both at the time of the purchase and sale, or the sale and purchase, of the security involved, or any transaction or transactions which the Commission by rules and regulations may exempt as not comprehended within the purpose of this subsection."

Section 3(a) subdivision 13 of the Securities Exchange Act of 1934, Section 78c(a), subdivision (13) of Title 15 U. S. C., reads as follows:

"The terms 'buy' and 'purchase' each include any contract to buy, purchase, or otherwise acquire."

Section 3(a) subdivision 14 of the Securities Exchange Act of 1934, Section 78c(a), subdivision (14) of Title 15 U. S. C., reads as follows:

"The term 'sale' and 'sell' each include any contract to sell or otherwise dispose of."

FILE COPY

No. 681

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

DINAH SHAW, a stockholder of Celanese Corporation of America, suing on behalf of herself and all other stockholders similarly situated and on behalf of and in the right of Celanese Corporation of America,

Petitioner,

—against—

CAMILLE DREYFUS and CELANESE CORPORATION OF AMERICA,

Respondents.

BRIEF FOR RESPONDENTS CAMILLE DREYFUS AND CELANESE CORPORATION OF AMERICA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

JOHN A. WILSON,
Attorney for Respondents,
20 Exchange Place,
New York 5, New York.

CLIFFORD M. BOWDEN,
MICHAEL J. DESANTIS,
Of Counsel.

THE COURT PRESS, N. Y. C.

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Opinions Below.

The opinion of the District Court (R. 55-59) is reported in 79 F. Supp. 533.

The opinion of the United States Court of Appeals (R. 68-73) is reported in 172 F. 2d 140.

Jurisdiction.

The judgment of the United States Court of Appeals was entered January 19, 1949 (R. 73, 74). The petition for a writ of certiorari was filed on March 31, 1949.

The jurisdiction of this Court is invoked under Section 1254 of Title 28, United States Code, which is made ap-

plicable by Section 27 of the Securities Exchange Act of 1934 (15 U. S. C. A. 78aa).

Statement.

The Facts.

The respondent, Celanese Corporation of America (hereinafter referred to as the "Corporation"), under Delaware Law and pursuant to resolutions duly adopted by its Board of Directors, issued and mailed to its common stockholders of record rights to subscribe, at $50 a share, for additional shares of common stock on the basis of one share for each 10 shares held (R. 4, 39). The rights were mailed on October 9, 1945 and were to be exercised on or before October 24, 1945 (R. 39).

Dreyfus was a stockholder of record holding 106,343 shares of common stock, and accordingly received 106,343 rights (R. 39). These rights entitled him to subscribe for 10,634 3/10ths additional shares of common stock (R. 39). At the time Dreyfus received the rights he was a director and chairman of the Corporation (R. 38).

On October 19, 1945, L. A. Mathey & Co., a brokerage firm, sold 27,400 rights on the open market for Dreyfus' account at a price of 2/16 (R. 40, 41). On October 23, 1945, it similarly sold an additional 48,940 rights as follows: 43,100 at 1/16; 5,800 at 2/16; and 40 at 1/32 (R. 41). The net proceeds to Dreyfus from the sale was $5,915.41 (R. 42).

Dreyfus exercised 30,000 of the rights which he still held, and received on October 23, 1945, 3,000 shares of common stock (R. 41).

Out of these 3,000 shares he made gifts aggregating 1,460 shares between November 12, 1945 and January 6, 1946 (R. 44, 45). The donees were: some of Dreyfus' relatives; certain friends; a personal employee; two

employees of the Corporation; and his secretaries (R. 46). Dreyfus received no consideration for the stock from any of the donees (R. 47).

The donees retained the common stock given to them by Dreyfus and did not sell or transfer any common stock of the Corporation within six months from the date when the transfers were made to them by Dreyfus (R. 54).

Dreyfus filed gift tax returns with the Internal Revenue Department for the years 1945 and 1946 in connection with those stock gifts having a greater value than $3,000 in each year (R. 48). He also filed reports with the Securities and Exchange Commission in 1945 and 1946 reflecting the transfers of the 1,460 shares of common stock as gifts (R. 48).

The Action.

Petitioner brought this action under Section 16(b) of the Securities Exchange Act of 1934, to compel respondent, Camille Dreyfus, to account to the respondent Corporation for all profits alleged to have been made by him from "purchases and sales" and "sales and purchases" of common stock and rights to purchase common stock within periods of less than six months (R. 3-11).

The First Cause of Action.

Petitioner alleges that the "acquisition" by Dreyfus of the 106,343 rights was a "purchase" within the meaning of the Act; that within a period of less than six months he "purchased and sold" 73,643 of these rights; and that he realized a "profit" therefrom within six months which was not recovered by the Corporation (R. 5).

The Third Cause of Action.

Petitioner repeats substantially all of the above allegations set forth in the first cause of action (R. 9) and alleges further in substance: that Dreyfus "converted"

3,000 of the 106,343 rights issued to him and subscribed for and received 3,000 shares of common stock; that the acquisition by Dreyfus of the 3,000 shares was a "purchase" within the meaning of the Act; that within six months Dreyfus purchased the 3,000 shares and "sold" 1,460 shares of the Corporation's common stock; and that Dreyfus realized a "profit" therefrom which was not recovered by the Corporation (R. 9, 10).

The Motions Made in the District Court.

Both parties moved for summary judgment on the pleadings and affidavits (R. 25-54).

Petitioner conceded on the argument of the motions that respondents were entitled to summary judgment with respect to the second cause of action (R. 60). The Court dismissed that cause of action (R. 61) and no appeal was taken therefrom to the United States Court of Appeals.

Decision of the District Court.

The District Court denied petitioner's motion for summary judgment; and granted respondents' cross-motion for summary judgment and dismissed the complaint (R. 60, 61).

Decision of the United States Court of Appeals.

The judgment of the District Court was affirmed by the United States Court of Appeals (R. 72).

The Court held: that the receipt of the rights by Dreyfus was not a "purchase" within the intendment of Section 16(b) of the Securities Exchange Act nor as defined in Section 3(a)(13) of the Act; and that the gifts of common stock by Dreyfus were not "sales" within the meaning of Section 16(b) nor as defined in Section 3(a)(14) of the Act (R. 71).

Statute Involved.

Section 16 of the Securities Exchange Act of 1934 (Section 78p of Title 15 U. S. C. A.) so far as pertinent, reads as follows:

> "(b) *For the purpose of preventing the unfair use of information which may have been obtained* by such beneficial owner, director, or officer by reason of his relationship to the issuer, *any profit* realized by him *from any purchase and sale, or any sale and purchase,* of any equity security of such issuer (other than an exempted security) within any period of less than six months, unless such security was acquired in good faith in connection with a debt previously contracted, shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such beneficial owner, director, or officer in entering into such transaction of holding the security purchased or of not repurchasing the security sold for a period exceeding six months. * * *" (Italics ours.)

Section 3(a) subdivision 13 of the Securities Exchange Act of 1934 (Section 78c(a) subdivision (13) of Title 15 U. S. C. A.) reads as follows:

> "The terms 'buy' and 'purchase' each include any contract to buy, purchase, or otherwise acquire."

Section 3(a) subdivision 14 of the Securities Exchange Act of 1934 (Section 78c(a) subdivision (14) of Title 15 U. S. C. A.) reads as follows:

> "The terms 'sale' and 'sell' each include any contract to sell or otherwise dispose of."

Questions Presented.

1. Whether the receipt by Dreyfus of 106,343 rights from the Corporation and the subsequent sale by him of

76,340 of those rights was a "purchase and sale" within the meaning of Section 16(b) of the Securities Exchange Act of 1934?

2. Whether the gifts by Dreyfus of 1,460 shares of common stock of the Corporation were "sales" within the meaning of Section 16(b) of that Act?

Argument.

POINT FIRST.

The receipt by Dreyfus of 106,343 rights was not a "purchase" and therefore the sale of the 76,340 rights did not constitute a "purchase and sale" within the meaning of the Act.

Respondents concede that the 106,343 rights received by Dreyfus were "equity securities" and that he sold 76,340 of them within six months after receipt. However, Dreyfus did not "purchase" the 106,343 rights.

Dreyfus did not make any payment in money or its equivalent for the rights or acquire them by any affirmative act. He did not receive them as a result of any personal "business decision"; he was a mere passive recipient of the rights. The rights were distributed to over 12,000 other holders of common stock pro rata on exactly the same basis as to Dreyfus. Title to them was inherent in stock ownership. The acceptance by Dreyfus of his proportionate share was not a "purchase" as that word is commonly understood. Nor was it an acquisition within the meaning of the Act.

While respondents have never contended that the meaning of "purchase" should be restricted to a transaction solely for cash as petitioner seems to imply (br., p. 8),

nevertheless the word should be accorded its common and popular meaning. Congress did not intend otherwise.

I.

The Popular Meaning of "Purchase".

It is a settled rule of statutory construction that Congress, in drafting a statute, will be presumed to have used language in its usual signification and in accordance with common understanding. *Woolford Realty Co.* v. *Rose*, 286 U. S. 319, 327 (1932).

The popular meaning of "purchase" is the acquisition by voluntary act or agreement of something for a valuable consideration, that is, by payment of a price in money or its equivalent.*

In *Johnston* v. *United States*, 145 F. (2d) 137, 138 (C. C. A. 9th Circuit, 1944), the Circuit Court of Appeals defines a "purchase" as follows:

> "* * * The definition of the word 'purchase' in Funk & Wagnalls' 'New Standard Dictionary' (1940) applicable here is: '3. Law (1) to acquire (property) by one's own act or agreement, as distinguished from the act or mere operation of law.'"

The receipt by Dreyfus of his share of the rights was not a "purchase" in the ordinary meaning of that word. He received them as a mere distributee, along with thousands of other stockholders and not as the result of any affirmative act done or agreement made, by him, but under Delaware Law. Moreover, he gave no *quid pro quo* and paid no consideration in any form whatsoever.

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* *Berger* v. *United States Steel Corporation*, 63 N. J. Eq. 809, 817 (1902).

II.

Section 3(a) (13)—"buy", "purchase", or "acquire".

The word "purchase" is not defined by the Act. However, Section 3(a)(13) states that the terms "buy and purchase" each include "any contract to buy, purchase or otherwise acquire."

But the rights were not contracts of any kind; they were merely offers. Clearly only when those offers were accepted, by the exercise of the rights, did contracts between the stockholders and the Corporation result. The rights themselves were not "contracts to buy or purchase"; nor were they "contracts to acquire," within Section 3(a) (13) as petitioner seems erroneously to suggest (br., p. 12).

Petitioner contends that the phrase "or otherwise acquire" includes *any acquisition* (br., pp. 8, 9). The Court below correctly rejected such contention.

In *Truncale* v. *Blumberg,* D. C. S. D. N. Y. 80 F. Supp. 387, 390, where, unlike the present case, warrants were issued to defendant *pursuant to a contract* between him and the defendant corporation, Judge Medina properly held that they were "acquired by him". Nevertheless, the Court pointed out:

> "That all 'acquisitions' are not 'purchases' and all 'disposals' not 'sales,' within the meaning of Section 16(b) seems demonstrable, and in accord with the definitions contained in Section 3(a) (13) 15 U. S. C. A. §78c(a)(13) and Section 3(a)(14)."

Petitioner's contention also violates the *ejusdem generis* rule as applied to the construction of statutes. While the language "or otherwise acquire" appears to be a "clean-up" phrase it has been held that such phrase includes only matters similar in kind or of like kind or character to the classification of the words immediately preceding it.

Thus, in *In re Bush Terminal Co.*, 93 Fed. (2d) 659, 660 (C. C. A. 2d, 1938), the Court held that under the rule of *ejusdem generis* the words "other combustibles," as used in the New York City Personal Property Tax Law imposing a tax on oil, gas, gasoline and other combustibles, did not include coal notwithstanding that it was a combustible. The Court said:

> "• • • If 'combustibles' are supposed to include everything which is ordinarily intended to be burned, it would have been unnecessary for the statute to enumerate specifically the items which it does in section 1(k). The rule of *ejusdem generis* applies to such a statute. • • • The words 'other' or 'any other' following an enumeration of particular classes ought to be read as 'other such like' and to include only those of like kind or character. *U. S.* v. *Stever*, 222 U. S. 167, 32 S. Ct. 51, 56 L. Ed. 145; *U. S.* v. *Chase*, 135 U. S. 255, 10 S. Ct. 756, 34 L. Ed. 117; *Lyman* v. *Commissioner*, 1 Cir., 83 F. 2d 811; *Hodgson* v. *Mountain & Gulf Oil Co.*, D. C., 297 F. 269; *People* v. *Ryan*, 274 N. Y. 149, 153, 8 N. E. 2d 313."

Similarly, it would have been a simple matter for Congress to have defined a "purchase" as *"any acquisition"* as it did with other definitions contained in Section 3(a) of the Act. That Congress did not do so is clear evidence of its intention to limit and restrict the meaning of the phrase "or otherwise acquire" to the classification of words immediately preceding it. Accordingly, acquisitions within the meaning of the Act include only: acquisitions obtained through a "purchase"; or through "contracts to buy or purchase"; or as a result of any contract to acquire, of like kind or character to "contracts to purchase." The receipt of rights by Dreyfus was not that kind of acquisition.

Dreyfus did not receive the rights as the result of any "business decision," contract or other affirmative act of

his, and he gave no consideration for them. Accordingly, he never "acquired" the rights within the meaning of Section 3(a)(13).

III.

Rights Are Inherent in Stock Ownership—Nothing Is "Acquired".

The rights were sent to all common stockholders of record. Dreyfus, as one of thousands of common stockholders, was offered the right to contribute new capital to the Corporation. This right was inherent in his stock ownership, just as it was inherent in the stock ownership of every other common stockholder.

The nature of a right to subscribe is well set forth in *Miles* v. *Safe Deposit Co.*, 259 U. S. 247, 252, 253 (1922). That case indicates that title to rights is inherent in stock ownership. The stockholder merely receives an express acknowledgment of that right in the form of warrants to subscribe to new stock of the Corporation. There the Court said:

> "The right to subscribe to the new stock was but a right to participate, in preference to strangers and on equal terms with other existing stockholders, in the privilege of contributing new capital called for by the corporation—an equity that inheres in stock ownership under such circumstances as a quality inseparable from the capital interest represented by the old stock, recognized so universally as to have become axiomatic in American corporation law. * * *
>
> "The stockholder's right to take his part of the new shares therefore—assuming their intrinsic value to have exceeded the issuing price—was essentially analogous to a stock dividend. * * *"*

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* See S. E. C.'s instructions (footnote, *infra*, p. 22) which indicate that a stock dividend is not a "purchase".

The Court of Appeals in *Stokes* v. *Continental Trust Co.*, 186 N. Y. 285, 297 (1906), similarly defined the nature of such right, saying:

> "• • • The new stock belonged to the stockholders as an inherent right by virtue of their being stockholders, • • • He had an inchoate right to one share of the new stock for each share owned by him of the old stock, provided he was ready to pay the price fixed by the stockholders. If so situated that he could not take it himself, he was entitled to sell the right to one who could, as is frequently done. • • •"

The preemptive right of the stockholders of the Corporation to be offered the new stock and on equal terms inhered in their original shares. The receipt by them of warrants representing their preemptive right was not a "purchase" as the Court below properly held. It said (R. 70):

> "• • • Their (the stockholders') preemptive right to be offered the new stock and on equal terms inheres in their original shares and is essentially analogous to a stock dividend. 'Purchase' is not an apt word to describe the receipt by a stockholder of shares representing a stock dividend or of warrants representing his preemptive right to subscribe for new shares." (Parenthesis supplied.)

Thus, Dreyfus' interest in the Corporation remained the same after the receipt of the 106,343 rights. The only change was in the evidence representing that interest. Prior to the issuance of the rights, the common stock held by Dreyfus represented his interest in the Corporation. After their issuance the stock and the rights together represented his original investment. Dreyfus acquired nothing he did not already possess.

This the District Court recognized in its opinion saying (R., 58):

> "When the Corporation authorized and issued the new securities the defendant Dreyfus had a pre-emptive right to subscribe regardless of whether the Corporation issued to him the physical certificate evidencing this right. The scrip or 'rights' issued by the Corporation were merely formal acknowledgment of an option which Dreyfus already possessed as a stockholder. See *Palmer* v. *Commissioner*, 302 U. S. 63, 71; *Helvering* v. *Bartlett*, 4 Cir., 71 F. 2d 598. Dreyfus acquired nothing new except the document certifying to his right."

The receipt by Dreyfus of the rights was not a "purchase" or an acquisition within the meaning of the Act. The Corporation was obliged by reason of the pre-emptive rights of the common stockholders to issue warrants evidencing such rights to all common stockholders of record. This was done by resolutions of the Board of Directors. There was no "purchase"; nor was there any acquisition of like kind or character, involved in Dreyfus' receipt of his share of the rights.

Consequently, the United States Court of Appeals correctly held that there was not a "purchase and sale" of the 76,340 rights by Dreyfus, as is required by Section 16(b) of the Securities Exchange Act before recovery of alleged profits can be justified thereunder.

Cases Relied on by Petitioner.

Petitioner cites *Park & Tilford* v. *Schulte*, 160 F. (2d) 984, 987 (C. C. A. 2d, 1947), cert. den. 332 U. S. 761 (1947), in support of her position (br., pp. 13, 14). But that case is materially different on its facts and does not control our

case. Defendants were trustees holding preferred stock which by its terms was convertible into common stock. Rather than redeem their preferred stock pursuant to a notice of redemption by the Board of Directors defendants elected to convert their preferred stock into common stock. Within six months after conversion, they sold the common stock. Defendants owned a majority of the common stock of the corporation and controlled the defendant Corporation.

Plaintiff corporation sought to recover the profits realized by defendants from the sale of the common stock. The District Court held that the conversion of the preferred stock into common stock was a "purchase" within the meaning of the Act. On appeal the Court of Appeals sustained that view.

However, the *Park & Tilford* case is readily distinguishable. There defendants transferred something of value to the corporation in exchange for common stock; they surrendered their preferred stock. Here, Dreyfus transferred nothing of value to the Corporation for his rights.

There defendants were required to exercise an option to convert their preferred stock into common stock before the corporation would issue the common stock. That option was a right defendants obtained by virtue of a contract made between them and the corporation at the time of the issuance of the preferred stock. Here, Dreyfus did not exercise any contract right.

There defendants took personal affirmative action, and made a "business decision" in order to obtain the common stock. Here, Dreyfus took no affirmative action and made no "business decision." The rights were mailed to him and to all other common stockholders without any action on their part.

There defendants may have taken advantage of "inside

information" in deciding whether or not to convert their preferred stock into common stock. Here, Dreyfus could not possibly have taken advantage of any "inside information" in obtaining his rights.

Further, in the *Park & Tilford* case the defendants owned a *majority* of the voting common stock and the Court found that they controlled the defendant corporation. That is not the situation here.

Petitioner erroneously states, however, that: Dreyfus was the largest stockholder of the Corporation; that he controlled the Corporation's Board of Directors; that because of his position and control he could have prevented the passage of the resolution by the Board of Directors (br., p. 14). There is nothing whatsoever in the record to support those statements and they are contrary to the facts.

Petitioner also cites *Kogan* v. *Schulte*, 61 F. Supp. 604, 607, 608 (D. C. S. D. N. Y., 1945), a companion case, substantially identical with the *Park & Tilford* case, *supra* (br., p. 7). That case has little or no relevance to the issues here presented.

There the Court points out that *affirmative action* was required by the preferred stockholders before the corporation would issue common stock in their names; and that the common stock was *paid* for by the preferred stockholders by delivery to the corporation of their preferred stock. The facts of the present case are materially different. Holding that the conversion of preferred stock into common stock was a "purchase", Judge Leibell said:

> "Prior to January 31, 1944, Mr. Schulte possessed a right to exchange his preferred stock for common stock of the corporation. The corporation could not force the exchange. *Some voluntary act on Mr. Schulte's part was required to bring about the exchange of his preferred stock for the common stock.* • • •

"* * * In the exercise of the conversion privilege on January 31, 1944, David A. Schulte acquired 342½ shares of common stock from the treasury of Park & Tilford, Inc. He *paid for it*, not in cash but by delivering to Park & Tilford, Inc., 247 shares of its preferred stock. * * *" (Italics ours.)

IV.

The Transaction Is Not Within the Intent of Congress.

Congress never intended to include within Section 16(b) of the Act a transaction which involved only a receipt of rights by a stockholder and a subsequent sale thereof within a six-month period.

The purpose of Section 16(b) was to discourage insiders who might have advance inside information which could be taken advantage of by them, from engaging in "short-swing" speculation. This purpose is reflected in the language of the Act itself (*supra*, p. 5), in its legislative history* and in the decisions of the Courts.

In *Smolowe* v. *Delendo Corporation*, 136 F. (2d) 231, 235 (C. C. A. 2d, 1943), cert. den. 320 U. S. 751 (1943), the Court said:

"The primary purpose of the Securities Exchange Act—as the declaration of policy in § 2, 15 U. S. C. A. § 78b, makes plain—was to insure a fair and honest

* Report by Representative Rayburn of the Committee on Interstate and Foreign Commerce, Cong. Rec., Vol. 78, Pt. 7, 73d Cong., 2d Sess., p. 7705.

Discussion by Representative Milligan, Cong. Rec., Vol. 78, Pt. 7, 73d Cong., 2d Sess., p. 7938.

Hearings before Committee on Banking and Currency on S. Res. 84, 72nd Cong., 2d Sess. and S. Res. 56 and S. Res. 97, 73d Cong., 1st and 2d Sess. (1934), p. 6557.

Hearings before Committee on Interstate and Foreign Commerce on H. R. 7852 and H. R. 8720, 73d Cong., 2d Sess. (1934), pp. 85, 132, 133.

> market, that is, one which would reflect an evaluation of securities in the light of all available and pertinent data. Furthermore, the Congressional hearings indicate that § 16(b), specifically, was designed to protect the 'outside' stockholders against at least short-swing speculation by insiders with advance information."

Similarly in *Truncale* v. *Blumberg, supra* (p. 8), Judge Medina said (p. 391):

> "• • • Doubtless it was the intention of the Congress that the terms of Section 16(b) should cover any acquisition or disposal of the securities which might reasonably be considered in the category of a 'purchase' or a 'sale', in connection with which an insider might profit by the use of confidential information to the detriment of the outside stockholders and the corporation."

Petitioner contends, in effect, that since an officer or director who exercises his rights, subscribes for stock and then sells the stock within a six-month period would be liable for profits realized, Dreyfus should, on the present facts, be similarly liable (br., p. 10). However, such officer or director would have had to take some affirmative action, personal to him, in exercising his rights and in subscribing for the stock. Such business decision might well have been motivated and induced by inside information; and a sale of the stock by such officer or director within six months would clearly bring such transaction within the purpose and intent of the Act. Those circumstances do not exist, however, in the present case.

The rights were issued and distributed to all common stockholders, pro rata, under the Delaware Law and pursuant to resolutions of the Board. Dreyfus obtained his share because he was a common stockholder and not as a result of any inside information, or of any contract or act

on his part. Certainly there was no use of inside information to get in and out of a stock within six months, and thus make a "short-swing" speculative profit.

The Court below properly stated that the purpose of the statute would not be defeated by refusing so unusual a meaning to the word "purchase" as is urged by petitioner (R. 70).

V.

An Enforced Long-Term Holding Would Be Confiscatory.

The Act seeks to discourage the use of inside information to make "short-swing" profits. Profits arising out of long-term holdings, that is, for a period of over six months, are not penalized.

But Dreyfus could not have held the rights for six months or more without permitting them to expire. The rights by their terms expired fifteen days after they were issued. He either had to sell the rights or allow them to expire and suffer a loss.

Petitioner correctly indicates that the Act did not prohibit the sale by Dreyfus of the rights, but petitioner argued in the Court below, that once having sold them, Dreyfus would be obligated to account to the Corporation for the proceeds of sale. This would be grossly unreasonable and inequitable.

Wherever there is a capital offering in the form of rights entitling stockholders to subscribe for stock for less than its market value, there follows an immediate dilution of the stockholders' equity in the corporation's capital, surplus, net earnings and voting power. The value of their old shares depreciates. However, a stockholder generally can recoup that loss either by selling the rights or by subscribing to the new stock at less than its market value. See Dewing, *The Financial Policy of Corporations*, 4th Ed. Vol. II (pp. 1211, 1212).

But if the only alternatives available to Dreyfus were to allow the rights to expire, or to sell them within six months and pay over the proceeds to the Corporation, he would be unable to recoup such loss. His would be a "Hobson's choice".

The statute so construed would deprive Dreyfus of his property without compensation, would be confiscatory, unreasonable and of doubtful constitutionality, as the District Court soundly held (R. 59):

> "To construe the Act as requiring Dreyfus to hold his rights beyond the six months and allow them to expire or to sell them within the period and account to the Corporation for the proceeds, would be confiscatory, unreasonable, of doubtful constitutionality, and not, I think, within the intent of the Congress. It is my opinion that the receipt by Dreyfus of the 'rights' or scrip does not come within the terms 'buy, purchase, or otherwise acquire' as those words are used in Section 78c (a)(13) of the Securities Exchange Act of 1934."

VI.

There Was No Profit From the Receipt and Sale of the Rights.

A right to subscribe is inherent in a share itself (*supra*, pp. 10-12). Each right is part of the share of stock to which it belongs. When the right to subscribe is offered to stockholders, it is split away from the stock; and the stock is said to go ex-rights.

When a subscription offering is made and rights are issued, the old share and the issued right, thereafter, together represent the stockholder's investment in the corporation. At the time of the issuance of warrants representing the preemptive rights, the value of the old share

should theoretically drop in an amount equal to the value of the right, and the aggregate value of the two should equal the value of the old share prior to the issuance of the rights. Thereafter, when a stockholder sells his rights he, in effect, disposes of part of his capital interest represented by his old shares. See Dewing, *The Financial Policy of Corporations*, 4th Ed. Vol. II (pp. 1211, 1212); and Montgomery, *Financial Handbook*, 1937 (p. 542).

In *Miles* v. *Safe Deposit Co.*, 259 U. S. 247, 253 (1922), *supra* (p. 10), this Court also expounded this view, saying:

> "• • • To treat the stockholder's right to the new shares as something new and independent of the old, and as if it actually cost nothing, leaving the entire proceeds of sale as gain, would ignore the essence of the matter, and the suggestion cannot be accepted. The District Court proceeded correctly in treating the subscription rights as an increase inseparable from the old shares, not in the way of income but as capital; in treating the new shares if and when issued as indistinguishable legally and in the market sense from the old; and in regarding the sale of the rights as a sale of a portion of a capital interest that included the old shares."

In the light of these established principles, it becomes apparent that Dreyfus actually made no profit. On October 9, 1945, the date upon which the rights were registered and issued in Dreyfus' name, there were no market transactions on the New York Stock Exchange reflecting the value of the rights (R. 40). The rights appeared on the Exchange for the first time on October 10, and were quoted at ⅛th (low) (R. 40).

On October 9, 1945, the common stock of the Corporation sold at 54 (low) (R. 40). However, on October 10, 1945, its price dropped two points and the common stock sold at 52 (low) (R. 40). If other market conditions influencing the value of the stock be ignored

the value of the stock should theoretically have declined in an amount equal to the value of the rights, namely, ⅛th.

The two-point decline in value of the common stock on October 10 should be attributed to the extent of ⅛th, to the corporate offering of new stock on October 9, 1945. The drop in value beyond ⅛th should undoubtedly be attributed to the influence of other market conditions. Dreyfus, therefore, had to sell his rights for at least ⅛th in order to recoup the depreciation in value of his stock attributable to the issuance of the rights. And he would have had to sell at a price higher than ⅛th to realize any "profit" on his rights.

Actually, Dreyfus sold part of his rights at ⅛th and the balance, more than one-half, at less (R. 40, 41). In no instance did he sell any of his rights at a price greater than ⅛th. Accordingly, Dreyfus' receipts from his sales of rights amounted to less than the depreciation in value of his common stock caused by the issuance of rights. Instead of making a "profit" he suffered a loss.

Furthermore, it is a matter of common knowledge that rights generally sell higher at the beginning of the subscription period than at the end. Yet Dreyfus did not immediately offer his rights for sale on October 10, 1945, when the market price was highest (¼) (high). On the contrary, he held them until October 19, and October 23, close to the end of the period. Clearly his conduct was not that of a short-swing speculator seeking to make a quick profit.

POINT SECOND.

The gifts of 1,460 shares by Dreyfus were not sales or "dispositions" of stock within the statute and, therefore, there was no purchase and sale within the intent and scope of the Act.

Respondents concede that Dreyfus "purchased" 3,000 shares of common stock by exercising 30,000 rights out of the total 106,343 rights issued to him and subscribing for 3,000 shares of common stock. But his transfers aggregating 1,460 shares of common stock within the six-month period, were gifts and not "sales" within the meaning of the Act.

Between November 12, 1945 and January 6, 1946, Dreyfus gave the 1,460 shares, without receiving any consideration, to various individuals consisting of: some relatives; certain friends; a personal employee; and two employees of the defendant Corporation, his secretaries. These transfers were bona fide gifts; and petitioner has not contended otherwise (br., pp. 18, 19).

Dreyfus filed gift tax returns for the years 1945 and 1946 in connection with those gifts having a value greater than $3,000; and he also made reports of the gifts to the Securities and Exchange Commission (R. 48).

All donees retained the stock and did not sell or transfer any common stock of the Corporation within six months from the date of the transfers to them (R. 54).

I.

Gifts Are Not "Sales".

Since the transfers were bona fide gifts, the transactions do not fall within the meaning of the statute. "Gifts" are not "sales". While there was a "purchase" of 3,000 shares

there was no "purchase and sale" of the 1,460 shares within the required six-month period.

The word "sale" like the word "purchase" should be construed and given its common and popular meaning. Such construction is in accordance with well-settled rules (see previous discussion, *supra*, p. 7).

The common meaning of the word "sale" is a transfer of property for a fixed price in money or its equivalent. *Five Per Cent Cases*, 110 U. S. 471, 478 (1884).

There is no doubt that a "gift" is not a "sale" as commonly understood. A sale is a transfer of property for a fixed price in money or its equivalent. A gift differs from a sale in that a gift involves no return or recompense for the thing transferred. In the case at bar there was no consideration whatsoever passing between Dreyfus and the donees of the 1,460 shares of common stock.

In *Truncale* v. *Blumberg, supra* (p. 8), Judge Medina held that by no stretch of the imagination could gifts be regarded as sales, saying (p. 391):

> "• • • By no stretch of the imagination, however, can a gift to charity or indeed to anyone else when made in good faith and without pretense or subterfuge, be considered a sale or anything in the nature of a sale. It is the very antithesis of a sale; and there is no reason to suppose that the Congress intended the statute to apply to gifts."*

* The S. E. C.'s instructions with respect to "Form 4" required by Section 16(a) of the Act to be filed by directors to reflect changes in ownership of equity securities, indicate that there is a difference between a gift and a sale. Dreyfus complied with those instructions in reporting to the Commission his transfer of the 1,460 shares as gifts on "Form 4" (R. 48, 49). Item 9 of the S. E. C.'s instructions states as follows:

"9. *Changes in ownership; character of.*—If the transaction is other than a purchase or sale, it should be so indicated; *e. g., gift, 5% stock dividend*, etc., as the case may be" (Prentice Hall; Securities Regulation Service, Vol. 1, p. 12032). (Italics ours.)

II.

Section 3(a)(14)—"Sell", and "Dispose".

The word "sale" is stated in Section 3(a)(14) of the Act to include "any contract to sell or otherwise dispose of." The meaning of the term "or otherwise dispose of" does not include *any disposal* but refers only to disposals within the same classification as those made through "contracts to sell" or similar contracts. (See discussion of the words "or otherwise acquire", *supra*, pp. 8-10).

Under the doctrine of *ejusdem generis* the language "or otherwise dispose of" must be construed as being confined and limited to the same classification as the words immediately preceding it, namely, "any contract to sell." But the stock gifts made by Dreyfus were not the result of similar contracts or of contracts of like kind. Indeed they did not result from contracts of any kind between Dreyfus and the donees.

The Court below, in accord with the intention of Congress that the terms of Section 16(b) should cover executed dispositions in the category of a sale, correctly held that a gift is not a transaction similar to a sale (R. 71).

A gift clearly is not a disposition within Section 3(a)(14) although that Section does include contracts to "otherwise dispose of" securities. A gift is a voluntary transfer without consideration, and, therefore, by its nature, could not possibly be the subject of a contract. For, a contract both imposes an obligation and involves consideration.

A gift is in all essential respects the antithesis of a sale. There is nothing commercial or suggestive of "the market place" about any gift. That was wholly true about those made by Dreyfus. His gifts were not a disposition of stock within the meaning of the Act.

III.

Gifts Do Not Involve a Profit and, Therefore, Are Outside the Act.

Insiders do not profit by making gifts; they receive no return. Since the Act makes only "profits" recoverable, "gifts" are clearly outside its scope.

Petitioner argues (br., p. 18) that the difference between the price paid by Dreyfus for the stock and the value of the stock on the date of the gifts should be considered as recoverable profit. A similar theory was advanced and rejected in the *Truncale* case, *supra* (p. 8). The Court said (pp. 389, 392):

> "On the face of the matter it seems nothing short of absurd to consider these gifts as 'sales' within the meaning of Section 16(b). *The notion that gifts to charity might result in 'profits' to the donor seems equally fanciful.* Indeed, against the background of a statute designed to raise the standards of fiduciaries and thus protect the outside stockholders against short-swing speculation by insiders with advance information, *Smolowe* v. *Delendo Corporation*, 136 F. 2d 231, 235 (C. C. A. 2d 1943); *Kogan* v. *Schulte*, 61 F. Supp. 604 (S. D. N. Y. 1945), it is hard to see any relation whatsoever between gifts to charities and trading for profit in the market place.
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> "• • • to consider the transaction as a sale would require the construction of a merely theoretical 'profit' in cases where the donee did not resell or resold at a loss. • • • The very refinement of the reasoning which is required and the complications which present themselves on every side indicate that injustice would inevitably result." (Italics ours.)

Petitioner also contends that if a gift is not treated as a sale unscrupulous directors and officers might make gifts

of stock to friends and relatives, coupled with secret arrangements for the return of profits realized from its sale within a six-month period (br., p. 19). Such situation, however, would not involve bona fide gifts at all, but only sales under the guise of gifts. But we are not concerned here with any such ingenious scheme, artifice or subterfuge.

A similar argument was made in the *Truncale* case, *supra* (p. 8) and this also was rejected. The Court said (p. 391):

> "* * * Of course, if it appears that shortly after the gift, and within the six months' period provided by Section 16(b) the wife or other donee sells the stock, the circumstances may disclose that the wife or other donee was in effect an *alter ego* of the officer or director or beneficial owner and that the sale was really made by him. * * * But we are concerned here with no subterfuge, artifice or ingenious scheme but with a series of genuine bona fide gifts to well accredited charitable and philanthropic organizations. * * * The statute is applicable to sales, not to gifts. So to stretch the meaning of the words involved would make Section 16(b) a trap for the unwary and, it seems to me, would give it a meaning that never was intended."*

In the present case, the gifts were not only bona fide gifts but, moreover, the donees made no transfers of any common stock within the six-month period (R., 54).

The United States Court of Appeals was correct in rul-

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* See 95 U. of Pa. L. Rev. 468, 485, article by Robert S. Rubin, then an Associate Solicitor for the SEC and Myer Feldman, an attorney for the SEC, where it is stated: "A bona fide gift of securities would seem clearly outside the scope of the section, as would the usual charitable contribution * * *."

ing that the gifts made by Dreyfus were not within the evil at which the statute was aimed. It said (R. 70):

> "• • • Nor is it within the evil at which the statute was aimed. The statute authorizes the corporation to recover profits realized by 'insiders' from a 'short swing' transaction. Whether recovery could be had from either Dreyfus or his donee had the stock been sold within six months we need not say, but certainly so long as neither he nor his donee made any profit within six months period no unfair use of inside information, within the intendment of the statute, has occurred. It is plain that Dreyfus realized no profit by making the gifts. We see no justification for construing 'profit realized from any purchase and sale' to mean merely emotional gratification resulting from making the gift."

There was clearly no "purchase and sale" of the 1,460 shares. Accordingly, Dreyfus incurred no liability under Section 16(b) of the Act and there can be no recovery thereunder.

POINT THIRD.

The reasons asserted by petitioner for issuing the writ of certiorari are not valid.

I.

This case involves questions of construction of Sections 3(a) and 16(b) of the Securities Exchange Act of 1934. The only cases which have heretofore interpreted these parts of the Act (and which are the only cases claimed by the petitioner as being in conflict with the decision below) were decided by the United States Court of Appeals for the Second Circuit.

The Court of Appeals for the Second Circuit, in the instant case, considered its prior decisions and, instead of regarding them as conflicting in any way, cited one of them as an authority for the conclusion reached.

As against the Court's interpretation of its own prior decisions, we have only the unsupported assertion of the petitioner that there is a conflict in the decisions of this Court of Appeals. There is not even an assertion by petitioner that there is a conflict between the decision in this case and any decision of a Court of Appeals of any other Circuit.

The cases which petitioner claims to be conflicting are *Smolowe* v. *Delendo Corporation*, 2 Cir. 136 F. (2d) 231, cert. denied 230 S. Ct. 751 and *Park & Tilford, Inc.* v. *Schulte*, 2 Cir. 160 F. (2d) 984, cert. denied 68 S. Ct. 64.

In the *Smolowe* case, the directors whose transactions were the basis of the suit had admittedly bought and sold shares of stock within the six months period, but they contended that the liability of Section 16(b) of the Securities Exchange Act of 1934 did not apply because, except to a minor extent, "the certificates delivered by each of them upon selling were not the same certificates received by them on purchases during the period." The Court of Appeals rejected this contention and held that the statute was intended to apply to such a case. The case also involved other questions of interpretation relating to the computation of profits which are not pertinent here.

Although referred to at length in brief and argument by petitioner before the Court of Appeals, the *Delendo* case has obviously no relation to the issues presented in this case and is not even referred to in the opinion below.

The *Park & Tilford* case, decided by the Court of Appeals for the Second Circuit in 1947, as has been pointed out (see previous discussion *supra*, pp. 12-14) also involved facts materially different from this case. The

Park & Tilford case was, however, referred to, and cited by the Court below in its opinion as an authority for the interpretation of Section 16(b) reached in this case. The Court in our case said (R. 70, 71):

> "• • • The purpose of the section, as this court said in *Park & Tilford* v. *Schulte,* 2 Cir., 160 F. 2d 984, 987, certiorari denied 332 U. S. 761, 68 S. Ct. 64, was 'to protect the outside stockholders against at least short-swing speculation by insiders with advance information.' 'Inside' information which the directors may have cannot possibly be used to the detriment of other stockholders in voting to grant rights to all stockholders of record in proportion to their existing holdings; all are treated equally. Nor will the purpose of the statute be defeated by refusing so unusual a meaning to the word (purchase)" (parentheses supplied).
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> "• • • In *Park & Tilford* v. *Schulte,* 160 F. 2d 984, 987, we said that 'The Act certainly applies as well to executed acquisitions as to executory contracts to acquire.' But the acquisition there under consideration was one similar to a purchase. Schulte exercised an option to convert his preferred stock into common stock. Similarly, we would hold that the Act applies as well to executed dispositions as to executory contracts to dispose, provided the disposition is similar to a sale. But a bona fide gift is not a transaction similar to a sale. *Truncale* v. *Blumberg,* 80 F. Supp. 387, 389 (S. D. N. Y.). Nor is it within the evil at which the statute was aimed."

II.

The only other ground asserted as a reason for granting this petition, aside from contentions that the Court below erred in its interpretation of the Act, is that the questions presented involve "important questions of

national scope and are of the greatest importance and concern to the investing public of the United States." The mere statement of the facts and of the issues involved answers this contention.

From the standpoint of interest, the case merely involves an asserted statutory liability of a director to a private corporation on the special facts presented. From the standpoint of legal issues, the case presents two questions of the proper interpretation of Sections 3(a) and 16(b) of the Securities Exchange Act of 1934. It is submitted that these are not matters of national scope, or of great concern to the investing public of the United States.

In both the *Delendo* and the *Park & Tilford* cases, upon which petitioner places sole reliance, the United States and its administrative body in charge of the enforcement of the Securities Exchange Act (The Securities and Exchange Commission) intervened or filed briefs as *amicus curiae*, indicating that they thought matters of national scope and of public interest were there involved.

Despite the publication of the opinions below and knowledge that this case was pending by members of the Commission's staff, no effort has been made by any public authority to participate in this private litigation. The Securities and Exchange Commission obviously recognized that matters "of the greatest importance and concern to the investing public of the United States" are not here involved. The Commission is known to be both alert and painstaking where such matters are involved.

Furthermore, it seems fair to say that the non-action by public authorities, under the circumstances, indicates at least a tacit acquiescence in the interpretations of the Act reached by both the District Court and the Court of Appeals below.

The case has been correctly decided and this Court should not be required to pass upon it again. Further review is not warranted.

CONCLUSION.

The petition for a writ of certiorari should be denied.

April 29, 1949.

JOHN A. WILSON,
Attorney for Respondents,
20 Exchange Place,
New York 5, New York.

CLIFFORD M. BOWDEN,
MICHAEL J. DESANTIS,
Of Counsel.